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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 768

JACK T. HELM, NORBERT J. ABEL, KARL F. ABEL and L. C. WILKIRSON, co-partners doing business as TRANSPORTATION SERVICES, INC.,

Appellants,

vs.

STATE OF ARIZONA, ex rel. ROBERT MORRISON, Attorney General,

Appellee.

Statement as to Jurisdiction

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Appellants,

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STATE OF ARIZONA, ex rel. ROBERT MORRISON, Attorney General,

Appellee.

Statement as to Jurisdiction

In compliance with Rule 12 of the Supreme Court of the United States, as amended, Jack T. Helm, Norbert J. Abel, Karl F. Abel and L. C. Wilkirson, co-partners doing business as Transportation Services, Inc., submit herewith their statement, particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the Supreme Court of the State of Arizona entered in this cause.

OPINION BELOW

The opinion of the Supreme Court of the State of Arizona is reported in 85 Ariz. 321, 338 P.2d 787.

JURISDICTION

The judgment of the Supreme Court of the State of Arizona was entered on October 21, 1959. An order was entered on November 24, 1959, denying a petition for rehearing.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code Annotated Section 1257 (2).

QUESTION PRESENTED

The question presented is whether a condemning authority, after it acquires fee title to real property through eminent domain proceedings, may thereafter abandon its proceeding against the leasehold interest and whether the right to compensation for the leasehold interest became vested at the time the fee title was acquired.

STATUTE INVOLVED

Section 12-1126, Arizona Revised Statutes, provides:

> "§ 12-1126. *Final order of condemnation; filing; vesting of property*
>
> "A. When the final judgment has been satisfied, the court shall make a final order of condemnation, describing the property condemned and the purposes of the condemnation.
>
> "B. A copy of the order shall be filed in the office of the county recorder of the county or counties in which the property is located, and thereupon the property described shall vest in plaintiff for the purposes therein specified."

STATEMENT

The State of Arizona on March 29, 1957, commenced an eminent domain proceeding in the Superior Court of Maricopa County, Arizona, seeking to condemn certain real property and all interests therein for the purpose of reconstructing an interstate highway. On November 4, 1957, the trial court awarded the owners of the fee title of the property a judgment against the State of Arizona. This judgment was satisfied, a final order of condemnation was entered and filed with the County Recorder of Maricopa County, transferring the fee ownership of the property to the State of Arizona.

On February 7, 1958, the trial court entered a judgment in favor of Jack T. Helm, Norbert J. Abel, Karl F. Abel and L. C. Wilkirson, co-partners doing business as Transportation Services, Inc., awarding them damages for their leasehold interests in the property. Notice of appeal was filed in the Supreme Court of the State of Arizona by the State of Arizona from this judgment on March 31, 1958. By reason of the State's failure to prosecute its appeal, the Supreme Court of Arizona dismissed the appeal on December 9, 1958. On February 3, 1959, this decision was reversed by the Supreme Court of Arizona and the appeal was reinstated. Immediately thereafter the State of Arizona filed a motion to dismiss its appeal on the ground that it was abandoning its eminent domain proceedings against the lessees' interest in the property.

The Supreme Court of Arizona, by virtue of its decision in this case, has permitted an abandonment and entered an order directing the trial court to vacate the judgment awarding compensation to the lessees.

THE QUESTIONS ARE SUBSTANTIAL

No other court has had occasion to consider a case substantially similar to this. In view of the expanding highway

development program being carried on throughout the nation, the issues raised in this appeal will have to be met often in the future. Vital constitutional issues respecting the time when a right to compensation in an eminent domain proceeding becomes vested in the owners of a leasehold interest and if the State may deprive the owner of that right are involved.

It is well-settled that a condemnor cannot avoid liability by abandonment of proceedings after the condemnees' right to compensation has become vested. *Garrison v. City of New York*, 21 Wall. 196; *United States Fidelity & Guaranty [illegible] City of Asheville*, 85 F.2d 966 (C.A. 4).

[illegible]ehold interest is subject to condemnation and the ow[illegible]r thereof is entitled to just compensation. *United States v. General Motors Corp.*, 323 U.S. 357. When this right becomes vested, compensation cannot be denied him by the condemning authority.

An eminent domain proceeding is an *in rem* proceeding against the land. *United States v. Petty Motor Co.*, 327 U.S. 372; *Duckett & Co. v. United States*, 266 U.S. 149. A taking of the fee title to land causes all lesser interests to expire and a new title is founded. *Duckett & Co. v. United States, supra; United States v. Sunset Cemetery Co.*, 132 F.2d 163 (C.A. 7).

Consequently, when the trial court entered a final order of condemnation transferring the fee title to the property condemned to the State of Arizona, the leasehold interests in the property also became vested in the State of Arizona. Thereafter, the lessees' only right was to compensation. The State of Arizona, in fact, on January 7, 1958, at a pretrial conference before the trial court stipulated with the lessees that the only issue to be tried was the reasonable market value of the leasehold interest.

It cannot now be properly contended under the guise of Section 12-1126, Arizona Revised Statutes, that an additional final order of condemnation with respect to the lessees' interest must be entered before their right to compensation becomes vested.

If a condemnor were allowed to follow this procedure, there would be nothing to prevent the condemnation of the same property and abandonment of the action many times until an award which was felt satisfactory was obtained. By this method, condemnors could eliminate appeals from awards made to condemnees. Property owners would then be at the mercy of condemnors. *York Shore Water Co. v. Card*, 102 A. 321.

By virtue of its appeal, the State of Arizona attempted to have the verdict of the trial court awarding damages to the lessees set aside and vacated. It now attempts to have the same action accomplished by a voluntary dismissal and supposed abandonment of its proceeding.

Should a condemning authority be permitted to abandon its action in cases of this type, a chaotic condition would arise. Under what authority would the condemnor hold title? Are the lessees obligated to pay rent to the condemnor for that portion of the real property now owned by it? If so, how much rent should be paid and for how long a period? Does the condemnor have the right to institute forcible entry and detainer proceedings if rent is not paid to it by the lessees? Can the condemnor reinstitute eminent domain proceedings against the lessees' interest?

To permit the State of Arizona to abandon its eminent domain proceedings against the leasehold interest and to refuse to pay compensation as determined is to deny the lessees of their property without due process of law.